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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1436

THE STATE OF MINNESOTA, RUDY PERPICH, individually and as Governor of the State of Minnesota, WARREN R. LAWSON, M.D., individually and as Commissioner of Health of the Minnesota Department of Health, WARREN SPANNAUS, individually and as Attorney General of the State of Minnesota, their agents, representatives, successors, those acting in concert with them, and all others similarly situated,

Appellants,

vs.

PLANNED PARENTHOOD OF MINNESOTA, a Minnesota non-profit corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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INDEX

	Page
Jurisdictional Statement	1
The Opinions Below	2
Jurisdiction	2
Statute Involved	2
Question Presented	3
Statement of the Case	3
A. Family Planning Services in Minnesota	5
B. The Availability of Medical Care for Family Planning Service Recipients	7
The Question is Substantial	8
I. In Establishing Classifications For Eligibility To Receive State Family Planning Grants, The Legislature Rationally Distinguished Between Those Organizations Which Perform Abortions And Those Which Do Not	9
A. Funds Provided To Planned Parenthood For Pregnancy Counseling Will Necessarily Free Up Funds Within The Organization To Be Used For Provision Of Abortion Services Notwithstanding Careful Accounting	11
B. Pre-pregnancy Family Planning Funding To An Abortion Promoting Institution Provides An Opportunity For Potential Institutional Influence Affecting The Provision Of Pre-pregnancy Family Planning Services	15

Page

II. Reasonable Distinctions Exist To Differentiate Planned Parenthood And Similar Organizations From Hospitals And HMOs 17
A. The Legislature Rationally Granted Hospitals And HMOs Eligibility To Participate In Grant Awards Because They Provide Live Births, A Legitimate State Interest, And Thereby Contact Those Most In Need Of Pre-pregnancy Family Planning Services 18
B. Hospitals And HMOs Have Not Institutionalized Their Roles In Providing Abortion Services; Whereas Planned Parenthood Has So Institutionalized Its Role 21
Conclusion 25

APPENDICES

Page

A. Opinion and Decision of the United States Court of Appeals For the Eighth Circuit A-1
B. Memorandum Order of the United States District Court For the District of Minnesota A-11
C. Judgment Appealed From A-22
D. Statute Involved A-23
E. Notice of Appeal A-26

CITATIONS

Page

Cases:

Doe v. Mundy,
441 F. Supp. 447, 451 (E.D. Wisc. 1977) 9
Hodgson v. Lawson,
542 F.2d 1350 (8th Cir. 1976) 20, 23
Jefferson v. Hockney,
406 U.S. 535 (1972) 9
Lemon v. Kurtzman,
403 U.S. 602 (1971) 14
Levitt v. Committee for Public Education,
413 U.S. 472 (1973) 16
Maher v. Roe,
432 U.S. 464 (1977) 8, 9, 10, 11, 12, 19
Meek v. Pittenger,
421 U.S. 349, 371 (1975) 15
New Orleans v. Dukes,
427 U.S. 297, 303 (1976) 17
O'Brien v. Weinburger,
453 F. Supp. 85, 87 (D. Minn. 1978) 9
Poelker v. Doe,
432 U.S. 519 (1977) 10, 11, 18
United States Department of Agriculture v.
Moreno, 413 U.S. 528 (1973) 17
United States v. Maryland Savings Share Ins. Co.,
400 U.S. 4, 6 (1970) 9
Wolman v. Walter,
433 U.S. 29 (1976) 16

Page

Statutes:

Minn. Stat. § 145.012, Subd. 2 (1978) 4
Minn. Stat. § 145.912, Subd. 9 (1978) 4, 10, 15
Minn. Stat. § 145.925, Subd. 1 (1978) 4
Minn. Stat. § 145.925, Subd. 2 (1978) 1, 2
Minn. Stat. § 145.925 (Supp. 1979) 15
Minn. Stat. § 256B.011 (1978) 11, 15
MCAR 1.369, Rule 7 23

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Appellants,

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PLANNED PARENTHOOD OF MINNESOTA, a Minnesota non-profit corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States Eighth Circuit Court of Appeals filed on January 2, 1980, affirming the judgment of the District Court for the District of Minnesota and holding that the 1978 Minnesota Family Planning Grants Act[1] is unconstitutional.

[1] Minn. Stat. § 145.925, subd. 2 (1978) (codification of Minn. Laws 1978, ch. 775).

THE OPINIONS BELOW

The opinions of the Court of Appeals and the district court are not reported. They are set forth in the Appendix hereto.

JURISDICTION

This action was commenced by appellee (Planned Parenthood) in the United States District Court for the District of Minnesota pursuant to 28 U.S.C. §§1331 and 1343 for a declaratory judgment that the 1978 Minnesota Family Planning Grants Act, Minn. Laws 1978, ch. 775 (hereinafter the Act), is unconstitutional under several provisions of the United States and Minnesota Constitutions.

The district court sustained one of Planned Parenthood's claims, ruling on February 23, 1979, that the Act was violative of the equal protection clause of the fourteenth amendment of the United States Constitution. On January 2, 1980, the Eighth Circuit Court of Appeals entered an order affirming the district court's decision. Appellants (hereinafter the State) filed with the Court of Appeals a notice of appeal to this Court on January 17, 1980. Jurisdiction of this Court to review the decision of the Court of Appeals is conferred by 28 U.S.C. § 1254(2).

STATUTE INVOLVED

The critical provision of the Act at issue is Minn. Stat. § 145.925, subd. 2 (1978):

> The commissioner [of Health] shall not make special [family planning service] grants pursuant to this section to any nonprofit corporation which performs abortions. This provision shall not apply to hospitals licensed pursuant to sections 144.50 to 144.56, or health maintenance organizations certified pursuant to chapter 62D.

The foregoing section and related provisions of the Act are set forth in full in the Appendix.

QUESTION PRESENTED

Under the Act the State of Minnesota for the first time provided state funding to establish or expand pre-pregnancy family planning services of local governmental units and certain nonprofit private agencies. However, nonprofit corporations which perform abortions, except licensed hospitals and health maintenance organizations, are not eligible for such funds. The question presented is whether the court of appeals erred in holding that the exclusion of organizations such as Planned Parenthood from this first-time public funding is unconstitutional under the equal protection clause of the fourteenth amendment.

STATEMENT OF THE CASE

In July 1978, Planned Parenthood brought this action against various State of Minnesota officials, seeking declaratory and injunctive relief. Planned Parenthood alleged that the Act, by excluding it and similar nonprofit corporations from eligibility for public family planning service funds, abridged its right of privacy, denied it equal protection under the law, and constituted a bill of attainder, all in violation of the United States Constitution.

Following a trial to the court, the district court ruled that the Act did violate the equal protection clause but explicitly

rejected the remaining claims. That decision was affirmed by the court of appeals.

The Act establishes a program whereby state funds may be distributed by the Minnesota Commissioner of Health to local governmental units and nonprofit corporations for the provision of pre-pregnancy family planning services. Funds under the Act may not be used for the performance of abortions or similar post-pregnancy actions. Subdivision 1 of the Act[2] limits the grants to "pre-pregnancy" family planning services, and Minn. Stat. § 145.012, subd. 9 (1978) excludes from the definition of "family planning" the "voluntary termination of pregnancy."

As noted hereinabove,[3] subdivision 2 of the Act essentially prohibits the disbursement of state family planning service funds to nonprofit corporations which perform abortions. Such exclusion, however, does not apply to hospitals and health maintenance organizations (HMO's) which perform abortions. Since one of the 10 clinics operated by Planned Parenthood in Minnesota[4] performs abortions, Planned Parenthood is a nonprofit corporation excluded from funding under the Act. Tr. at 19-20.[5] At the present time, Planned Parenthood is one of at least two nonprofit corporations excluded from family planning funding under the Act because of their performance of abortions. Tr. at 67-68, 175.

Subdivision 9 of the Act appropriates $1.3 million of public funds to finance the family planning service grants. At the time of the trial herein, the Commissioner of Health had not distributed statutory funds to any agency due to the fact that the rules governing such distribution had not then been

[2] Minn. Stat. § 145.925, subd. 1 (1978).
[3] *See* Statement of Issue, *supra*.
[4] Of Planned Parenthood's 10 clinics, three are located in Minneapolis and St. Paul.
[5] The abbreviation "Tr." is used throughout this brief to refer to the transcript of the trial record.

promulgated. Various agencies, however, did submit grant applications to receive the family planning funds pending the adoption of rules. Tr. 309-310, 409. Planned Parenthood itself contingently applied for $96,000 in grant funds pending the outcome of the instant case. According to its grant application, Planned Parenthood would use most of the grant funds in the Minneapolis-St. Paul metropolitan area. Tr. at 31-32, 122, 408.[6]

A. Family Planning Services in Minnesota.

Considering all of the present services now available in Minnesota without the Act and including those provided by Planned Parenthood, the State is considered to be underserved with respect to public family planning. Tr. at 107, 284-287, 425. By use of the Act's funding, however, local governmental agencies can provide good public programs of family planning services. Tr. at 397-398, 399-401, 424-425, 439-440.

Excluding Planned Parenthood, Minnesota is now served by about 30 agencies which provide a broad range of family planning services and more than 100 additional agencies which offer some family planning services. Tr. at 377, 412. Through local county boards of health, public health nurses and social workers and non-governmental agencies other than Planned Parenthood, Minnesotans can obtain most of the on-site, non-medical family planning services. Tr. at 397-398.[7] With re-

[6] The family planning service funds for 1979 have now been distributed with the exception of those funds requested by Planned Parenthood directly or by sub-contract. Pursuant to a stipulation between the parties, the 1979 funds which would be disbursed to Planned Parenthood, if it were not for the contested statutory exclusion, have been held in an escrow account.
[7] Some Minnesota residents seeking referral for family planning assistance have expressly stated that they prefer not to consult Planned Parenthood, because of its policy of performing abortions. Tr. at 438-439.

spect to the provision of medical services, the foregoing local agencies can and do easily refer patients to hospitals, private physicians and pharmacists. Tr. at 183.

Currently Planned Parenthood is one of the largest organized providers of family planning services in Minnesota. Tr. at 58-59. Its 10 clinics are staffed by private physicians and medical personnel who work exclusively on a part-time basis and various non-medical counselors and employees. None of its clinics, including the St. Paul clinic providing abortions, offers more than minimal medical care and facilities, and for the most part none is generally open to provide such care beyond the traditional business hours each week. Tr. at 97, 160-161. There are no emergency or comprehensive medical care facilities available at any Planned Parenthood clinic. Tr. at 40-41, 327. Patients in need of emergency or critical medical care must obtain it at a hospital.

Planned Parenthood's abortion and family planning services[8] are financed by three main sources of income: as much as one million dollars in federal funds in an average year, patient fees and private contributions. Tr. at 20, 34. Some, but not all, of such income is received under certain restrictions as to use. Thus, Planned Parenthood is free to spend some of its income on any services it desires, including abortions. Tr. at 83-84 and 172.

Planned Parenthood, however, has never received any direct funds from the State of Minnesota in the past. Thus, subdivision 2 of the Act would not prevent Planned Parenthood from continuing to provide abortions and family planning services. It simply withholds public funds upon which Planned Parent-

[8] The decision to begin performing abortions at the St. Paul clinic was made after several years of study and only after formal adoption by Planned Parenthood's governing body. Tr. at 20-21, 41-42.

hood had never relied. *See* District Court Memorandum Order at 4, lines 24-31, dated February 23, 1979; and Tr. at 414.

B. The Availability of Medical Care for Family Planning Service Recipients.

There can be significant health hazards for women using various forms of family planning services. Tr. at 341-344. For example, women using certain birth control devices may have infections, tissue perforation and internal hemorrhaging which would require prompt emergency medical care and/or surgery. Tr. at 154-155, 341-344. Similar critical health problems also could arise during the performance of an abortion, thus requiring a clinic such as Planned Parenthood to refer the patient to a hospital. Tr. at 189.

There is at least one hospital in every Minnesota county; whereas Planned Parenthood has only 10 clinics out of which part-time family planning workers[9] work occasionally in other counties. Tr. at 403-404, 79, 181-182. Almost all births take place in hospitals. Tr. at 434-435.

Hospitals and HMO's are paid directly by patients for the use of their facilities, but physicians who actually perform the surgery or provide other medical care are paid separately by the patient. Tr. at 323-324 and 345-348. On the other hand, Planned Parenthood patients pay one bill to Planned Parenthood covering the cost of their abortion or family planning care, the use of the clinic facilities and the cost of the physician's services. Tr. at 163.

Hospitals and HMO's provide considerably more comprehensive medical care and services (routine, critical and emer-

[9] Planned Parenthood's family planning workers are not skilled in medical care. Tr. at 182-183.

gency) than does Planned Parenthood. Tr. at 326-329, 346-348, 433-434. Conversely, Planned Parenthood's primary function is the provision of family planning services and abortions. Trial Exhibits 1 and 2. Planned Parenthood's facilities, consequently, are not subject to the same state licensing requirements as hospitals and HMO's, and also are not subject to the accreditation standards of the Joint Commission on Accreditation of Hospitals. Tr. at 166, 326, 330. In sum, the availability of comprehensive and prompt medical care for women receiving family planning services or undergoing childbirth or an abortion is much greater at hospitals and HMO's than at a Planned Parenthood Clinic.

THE QUESTION IS SUBSTANTIAL

In *Maher v. Roe*, 432 U.S. 464 (1977) this Court held that states are free under certain circumstances to refuse to subsidize the performance of abortions with public funds. In enacting the Family Planning Grants Act, the Minnesota legislature attempted to accomplish two goals: (1) provide for the first time state financial aid for developing prepregnancy family planning services for Minnesotans and (2) maintain the State policy against subsidizing the performance of abortions, even indirectly. The effect of the lower courts' decisions, however, is to prevent Minnesota from achieving the second objective. This constitutes a clear intrusion of the courts into the proper exercise of a state's police powers, an improper second-guessing of the wisdom of legislative enactments.

I. IN ESTABLISHING CLASSIFICATIONS FOR ELIGIBILITY TO RECEIVE STATE FAMILY PLANNING GRANTS, THE LEGISLATURE RATIONALLY DISTINGUISHED BETWEEN THOSE ORGANIZATIONS WHICH PERFORM ABORTIONS AND THOSE WHICH DO NOT.

Both the district court and the circuit court held that the section of the Act challenged herein does not impinge upon a fundamental right of privacy and, therefore, tested the Act's classification by considering whether the eligibility exclusion of corporations which perform abortions was rationally related to a valid intention to avoid funding abortions.[10] Memorandum Order at 5, No. 79-1218, Slip. Op. at 2-3 (8th Cir. Jan. 2, 1980).

At issue is not the wisdom of the Family Planning Grants Act, nor its comprehensive scope, nor the precise factual basis upon which the legislature based its action. The question is the rationality of the Act. A grants award scheme such as the one at issue herein "will not be set aside if *any set of facts rationally justifying it is demonstrated and perceived by the courts.*" *United States v. Maryland Savings Share Ins. Co.*, 400 U.S. 4, 6 (1970). (Emphasis added.) Certainly the Act's classification in attempting to fund prepregnancy family planning while refraining from publicly funding abortions cannot be deemed to be irrational.

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[10] In the context of a challenge to a state funding statute, where no fundamental right is impinged, the district court correctly applied the rational basis test rather than the strict scrutiny standard. *Compare*, Maher v. Roe, 432 U.S. 464, 473-76 (1977); Jefferson v. Hockney, 406 U.S. 535 (1972); O'Brien v. Weinberger, 453 F.Supp. 85, 87 (D. Minn. 1978); and Doe v. Mundy, 441 F.Supp. 447, 451 (E.D. Wis. 1977).

The Act in the instant case distinguishes, in part, between those nonprofit corporations which perform abortions and those which do not perform abortions. Such a distinction as to which type of organization may qualify for grants and those which may not is neither arbitrary nor invidiously discriminatory. The courts below stated that a two-step analysis was involved in applying the rational basis test to challenged legislation. The first step required a legitimate state purpose for the legislation, and the second requires that the legislation must be rationally related to the purpose. The district court concluded that the Act's purpose of expanding prepregnancy family planning services was valid. The court perceived the legislative purpose behind the challenged provision was, in part, to insure that no state monies be used to fund abortion services. The court, citing *Maher v. Roe* 432 U.S. 464 (1977), found the legislative purpose to refuse to use public funds to subsidize abortions constituted a valid purpose but concluded that the challenged exclusion did not rationally relate to this purpose.

Unquestionably, given limited resources, the state may place priorities on potential recipients of funding by conferring benefits upon organizations perceived to further a legitimate state interest in promoting and favoring childbirth over abortion. *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). The exclusion of abortion providers as eligible recipients of limited state family planning funds is rationally related to a clearly defined and valid state interest in encouraging natural childbirth over abortion and discouraging abortion as an adjunct to or a component of family planning. Minn. Stat. § 145.912, subd. 9 (1978) defines "family planning services" to mean prepregnancy counseling and services. The statutory definition explicitly excludes the performance or encouragement of voluntary termination of pregnancies, i.e., abortions. Further evidence of the legislature's strong desire to avoid subsidizing abortions may be found in Minn. Stat. § 256B.011 (1978). Just as clear as the legislature's intention to avoid subsidizing abortions is Planned Parenthood's intentional and well publicized policy of providing abortions. Tr. at 22, 24, 33. Planned Parenthood views abortion as a means of family planning (albeit not a primary means). The state, on the other hand, has a clearly defined policy with respect to promoting childbirth as a family planning device.

The state's power to encourage preconception forms of family planning through funding is far broader than had it attempted to discourage abortion as an acceptable family planning device. *C.f., Maher v. Roe*, 432 U.S. 464 (1977). The state's decision not to fund agencies which view abortion as an acceptable family planning device is analogous to a city's judicially-upheld decision not to fund nontherapeutic abortions while providing funding for childbirths. *See, Poelker v. Doe*, 432 U.S. 519 (1977).

A. Funds Provided To Planned Parenthood For Pregnancy Counseling Will Necessarily Free Up Funds Within The Organization To Be Used For Provision Of Abortion Services Notwithstanding Careful Accounting.

Prepregnancy family planning has been recognized by both lower courts as a legitimate state interest. Similarly, the exclusion of public funding for abortions has also been deemed to serve a legitimate state interest. In view of those two recognized state interests, it is reasonable for the state to find, as a matter of *public* policy, that abortion is an unacceptable

family planning device. Therefore, it is in rational relationship to the state's interest for the state to choose not to fund the prepregnancy family planning operation within an organization which views abortion as an acceptable family planning device. To allow such funding would force the state directly to fund a family planning device which it rationally views as unacceptable.

The lower courts seemed to agree with the foregoing propositions but erroneously found insufficient evidence to support the possibility that family planning funds under the Act could indirectly be used by Planned Parenthood to fund abortion services. The courts relied solely upon testimony that Planned Parenthood carefully controls and monitors its own restricted funding. Tr. at 118-119, 171-172. The mere fact of separate accounting, however, does not address the issue of the "free-up" of funds which state subsidization would necessarily confer.

There is, moreover, sufficient factual evidence in the record to recognize that state funds received under the Act would inevitably "free up" some Planned Parenthood money for financing abortions, a result directly in conflict with a permissible purpose of the Act. *Compare, Maher v. Roe, supra.* Of Planned Parenthood's three current sources of income, *some* of its federal funding is specifically restricted as to uses. Tr. at 83-84, 172. Even assuming that these restrictions prohibit the funding of abortions,[11] the testimony indicated that no restrictions apply to private donations and patient fees (the other sources of income). Tr. at 83-84, 172. It is clear, therefore, that the addition of funds under the Act, even if fully

[11] The testimony of Planned Parenthood's witnesses did not indicate that abortions would be prohibited even by the restricted funds.

accounted for, would enable Planned Parenthood to finance more abortions.[12]

The lower courts have placed an insurmountable burden on the state by requiring it to show that the accounting practices used by Planned Parenthood are insufficient to prevent the "free up" of funds. Common sense dictates that if state funding is provided for prepregnancy counseling it will necessarily allow Planned Parenthood to use more of its originally unrestricted money for financing abortions than it could have without the additional funding. Appropriating money to Planned Parenthood is similar to appropriating cash grants to parents of nonpublic school children inasmuch as no guarantee exists that the money spent for legitimate purposes will not divert funds to disfavored or improper services. The fact that a Planned Parenthood patient receives a lump sum bill which includes both counseling and abortion fees is illustrative of how the two services, both the favored prepregnancy family planning and the disfavored public funding of abortion services, are inextricably intertwined within one institution. Indeed, funding one aspect of Planned Parenthood necessarily "frees up" money to be used for separate services, the public funding of some of which is clearly contrary to public policy.

The mere fact that Planned Parenthood would agree to use the additional monies only for prepregnancy services would not change the result. All the accounting principles and monitoring devices used with respect to but one part of the whole still relates only to that part. In such a situation, additional funding would "free up" more of Planned Parenthood's own unrestricted funds for abortions.

[12] In recent years the demands and needs for abortions have been increasing. Thus, it is likely that Planned Parenthood would endeavor to perform more abortions than it does at the present time. Tr. at 167-169.

The same analogy, however, does not apply to hospitals and HMOs. Hospitals and HMOs currently do not finance or seek reimbursement for abortions. Tr. at 323-324, 344-348, 434. That responsibility is solely between the physician and patient. Furthermore, the range of medical services in hospitals and HMOs is so vast and independent that the "free up" principle would not apply.

Moreover, an excessive administrative burden is placed on the state to assure that the funds are used as appropriated for prepregnancy family planning assistance and not abortion services. In addition, the burden of monitoring Planned Parenthood's accounting system to guarantee that no "freeing up" of prepregnancy counseling funds occurs is an even more onerous task. Again, the analogy to public funding of nonpublic schools is apparent. This Court has found in similar situations that the government inspections required to ensure constitutional compliance with funding limitations would create excessive administrative burdens. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The excessive administrative burden is clearly inherent where funding goes to an abortion promoting institution that also provides prepregnancy counseling.

Certainly, the legislative intent that public funds should not be used by organizations that provide only two purportedly conflicting services (prepregnancy family planning assistance and abortions) constitutes a more than adequate basis for the classifications within the Act. In delineating between those organizations which perform abortions and those which do not, the Legislature expressed a desire clearly to discard abortion as a state-approved family planning device.

B. Prepregnancy Family Planning Funding To An Abortion Promoting Institution Provides An Opportunity For Potential Institutional Influence Affecting The Provision Of Prepregnancy Family Planning Services.

Prepregnancy family planning as a desired state goal must be viewed in the context within which the service is provided inasmuch as the potential institutional influence may affect the provision of family planning services. Even though an institution provides prepregnancy services, the public funding of which is favored,[13] it may also institutionally advocate abortions as a family planning device, the public funding of which is disfavored.[14] In such a case, the legislature may rationally determine that the potential for influence exercised institutionally over the prepregnancy counseling service, in light of its advocation of abortion, is too great and contrary to public policy, and thereby properly exclude the institution from public funding.

The analogy to parochial school funding is strong because the public funding of secular education is favored, while the promotion of any particular religion is disfavored. The favored and disfavored activities of a parochial school exist within one institution. The potential for sectarian influence exercised by the teachers is a determinate as to whether secular functions within a parochial school may be publicly funded. For instance, the funding of on campus therapeutic, guidance and remedial services offered to parochial institutions is constitutionally forbidden so as to preclude any sectarian influence which the institution may exert on the therapist's or counselor's behavior. *Meek v. Pittenger*, 421 U.S. 349, 371 (1975).

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[13] Minn. Stat. § 145.925 (Supp. 1979).
[14] *See, e.g.*, Minn. Stat. §§ 145.912, subd. 9 (1978) and 256B.011 (1978).

Since the nature of the activity may present a remote possibility of influencing the guidance counselor to depart from religious neutrality, public funding is properly denied. *Id.* Therefore, the mere *potential* for sectarian influence may constitute grounds for denying public funding. The use of public funds to reimburse sectarian institutions for the cost of teacher-prepared testing in secular subjects, *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), and secular field trips, *Wolman v. Walter*, 433 U.S. 29 (1976), are prohibited when provided by personnel subject to the parochial entity's control.

Similarly, the recognition of the potential for abortion promoting influence provides a rational basis for denying public funding of the favored prepregnancy services within the institution. A counselor employed by an institution that adopts clearly disfavored policies regarding family planning is subject to the potential influence of the abortion promoting institution. Just as the potentiality of influence created within a sectarian institution providing secular services precludes public funding, the potentiality of influence exists within an abortion promoting institution such as Planned Parenthood may permit its exclusion from public funding and prepregnancy family planning services.

In summary, when an institution serves a dual purpose, one favored for public funding and the other disfavored, the determination as to whether public funding is appropriate must turn on the potential influence the institution may exert on the service provided. Here, the potential influence Planned Parenthood may have on its prepregnancy family planning staff is obvious.

II. REASONABLE DISTINCTIONS EXIST TO DIFFERENTIATE PLANNED PARENTHOOD AND SIMILAR ORGANIZATIONS FROM HOSPITALS AND HMOS.

The lower courts found there was no relevant distinction, in fulfilling the purposes of the Act, between hospitals and HMOs which merely provide facilities to those who perform abortions and Planned Parenthood which institutionally performs abortions. However, the distinctions between hospitals and HMOs which provide abortions and other organizations which provide abortions are relevant and rational, even if imperfect. Rather than choosing simply to abandon the task of funding family planning services or unnecessarily including all potential providers of family planning, regardless of their roles in providing childbirth and abortions, the legislature drew a line around those organizations thought most pertinent to all its objectives. Whether a better line could have been selected is irrelevant. *See, e.g., New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The circuit court asserts the reasoning of *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) to support its conclusion that no rational basis exists to distinguish between nonprofit organizations which are hospitals and HMOs and those which are not. No. 79-1218, Slip. Op. at 3 (8th Cir. Jan. 2, 1980). However, this Court in *Moreno* found that limiting participation in the food stamp program to households where members were all related to each other reflected a desire to harm politically unpopular "hippies," an illegitimate governmental interest. *United States Department of Agriculture v. Moreno, supra* at 534-535. The facts of *Moreno* are clearly distinguishable from those presented here-

in. Few would deny that creating a legislative classification merely to harm an unpopular group cannot constitute a legitimate governmental interest. However, the district court herein found that a legislative purpose to refuse to use public funds to subsidize abortions constitutes a valid public purpose. Furthermore, the circuit court quotes with approval that part of the district court opinion referencing the legislative intent to insure no state monies are used to fund even indirectly abortions or corporations which perform them. No. 79-1218, Slip. Op. at 4 (8th Cir. Jan. 2, 1980). Whereas the purpose of the challenged statue in *Moreno, supra,* did not constitute a legitimate governmental interest, the state's interest in setting funding priorities by conferring benefits upon organizations promoting and favoring childbirth over abortions does constitute a legitimate state interest. *Maher v. Roe,* 432 U.S. 464 (1977), *Poelker v. Doe,* 432 U.S. 519 (1977). An improper legislative intention to harm "hippies" is totally distinguishable from an appropriate legislative intention to confer benefits only upon organizations which promote childbirth and/or are neutral with respect to institutionally providing abortions. Indeed, there are several rational distinctions between hospitals and HMOs which perform abortions and other organizaions which perform abortions.

A. The Legislature Rationally Granted Hospitals And HMOs Eligibility To Participate In Grant Awards Because They Provide Live Births, A Legitimate State Interest, And Thereby Contact Those Most In Need Of Prepregnancy Family Planning Services.

Both Planned Parenthood and hospitals and HMOs have facilities for the provision of abortion, a family planning device disfavored by the state. But Planned Parenthood, unlike vice disfavored by the state. However, unlike Planned Parent-

hood, hospitals and HMOs also pursue active programs with respect to live childbirth, an interest which the state may legitimately encourage and reward, particularly in determining how to distribute limited resources. *See, Maher v. Roe,* 432 U.S. 464 (1977) and *Poelker v. Doe,* 432 U.S. 519 (1977).

Furthermore, the fact that hospitals and HMOs provide maternal care leading up to live childbirth, prenatal and neonatal care, whereas Planned Parenthood does not, is a significant distinction in effectively implementing a family planning program. Specifically with respect to the delivery of prepregnancy family planning services, hospitals provide the physical contact and ideal focal point for those most in need of the services. Women of childbearing age who already have children fall within the risk group for having unwanted children. Tr. at 365. It is apparently this risk group which may ultimately cause the increased health, social and financial costs which an effective family planning program is designed to counter. Inasmuch as the state agrees that providing family planning services to diminish the grave problems presented by unwanted children is a worthwhile goal, a hospital is the one identifiable and common locus where this high risk group has received health care with the first live birth delivery. The "vast majority," "more than 95 percent" of children are delivered in hospitals in Minnesota. Tr. at 434-435. What more captive audience exists to whom family planning services may be provided? What more receptive and willing persons would desire family planning services than those who have recently delivered an unplanned or unwanted child? Indeed, an ideal time for family planning services is at or near the time of a birth. Tr. at 435.

The legislature may well have perceived the fact that hospitals and HMOs are the ideal focal points for family planning services. As such, the legislature reasonably declared them eligible for grants, despite the fact that their facilities may be required to be available for physicians who wish to provide abortions. *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976). Their accessibility to the public, their identification by the public as health care providers and their contact with women of childbearing age greatly outweigh their provision of facilities wherein others (independent contractors) may perform abortions.

If the state chooses to deliver a health service to the public, hospitals are the most accessible and recognizable vehicles through which to deliver the service. There is at least one hospital in every county in the state. Many counties and urban areas have several hospitals. Inasmuch as physicians have staff privileges at one or more hospitals, Tr. at 326-329, presumably every person with a physician has access to a hospital. Furthermore, in hospitals and HMOs there is the "housestaff" professional physicians, nurses, and support personnel employed by the hospital both to aid those attending physicians who merely use the hospital as a place to admit patients and to provide primary care to those members of the public who look to the hospital as the facility wherein health care is provided. Tr. at 326-329 and 344-347. Indeed, portions of the "at-risk" population may be more likely to identify the hospital as a health care provider than a physician's office or a Planned Parenthood clinic. By making hospitals and HMOs eligible to receive funds under the Act, the legislature has selected the most accessible and available mechanisms to provide services. To have excluded the most extensive network of health centers throughout the state merely because they offer

facilities in which abortions may be performed by others would have been irrational. To have excluded the very organizations which have extensive contact with a large portion of the target population to be served would have been even more irrational.

B. Hospitals And HMOs Have Not Institutionalized Their Roles In Providing Abortion Services Whereas Planned Parenthood Has So Institutionalized Its Role.

There is an important distinction between hospitals and HMOs which passively provide a room and services to those patients whom a physician admits and Planned Parenthood which institutionally chose through corporate board policy to formally recognize abortion as an acceptable means of family planning.

In terms of furthering the valid state purpose of discouraging state-financed abortions generally and as a family planning device, the legislature rationally perceived a great distinction in philosophy, process, billing, personal contact, and role in decision-making as between a hospital and HMO and a patient and Planned Parenthood and its clients. It is reasonable that the legislature concluded that those corporations which voluntarily choose as a corporate policy to provide abortions are more likely to view abortions as an acceptable family planning device than those corporations which are neutral with respect to abortion. Furthermore, hospitals and HMOs also provide facilities for live birth, a state preference, whereas Planned Parenthood does not.

Institutionally, neither a hospital nor an HMO takes part in a woman's decision to have an abortion. The primary purpose of a hospital is merely to provide the facilities, equip-

ment and the support personnel which are necessary to assist physicians who have been granted staff privileges to use the hospital. Tr. at 325-326 and 344-346. The relationship of the physician to the hospital is that of an independent contractor. Tr. at 323-324. The hospital may control neither the means nor the methods of an attending physician who is responsible for all medical decisions with respect to any patients [s]he admits to the hospital. Indeed, it is the physician's decision as to whether the patient will even be admitted to a hospital and, in consultation with the patient, to which hospital the patient is referred. Tr. at 325-326, 344-346. Decisions affecting diagnosis and treatment are left with the physician in consultation with the patient. Id. With respect to a decision to have an abortion, the hospital exists merely as a place wherein an independent decision made by others to procure an abortion may be implemented. A hospital neither participates in the decision to have an abortion nor performs it. A hospital passively receives patients who are admitted by their physicians to have abortions and provides the space, equipment, and staff so that the physicians may perform the abortions.

The separation of a decision-making role between a hospital receiving a patient and a physician recommending, prescribing and performing an abortion is further demonstrated by fee arrangements. The hospital charges and bills a patient for providing her with a room, meals, equipment, support services and support personnel. Tr. at 325-326, 344-346. These services would be charged by the hospital on an item basis regardless of whether the patient was to have an appendectomy, an abortion, or to deliver a live child. However, the patient's physician separately charges and bills for providing medical advice and performing the abortion. Tr. at 324. There is no linkage between physician and hospital fees because the hospital charges only in its capacity as a receptacle of those whom physicians admit for abortions.

The trial evidence indicated that no hospital in Minnesota has institutionalized its role in abortion services through hospital board policy. Tr. at 345. Indeed, a public hospital does not have the freedom to deny access or facilities to physicians who perform abortions and/or those patients who desire them. *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976). Similarly, HMOs have not voluntarily sought to provide the facilities for abortions, but have been compelled to do so pursuant to rule 7 MCAR § 1.369 of the Minnesota Department of Health. Thus, HMOs have no legal choice in the making of their facilities available for abortions. Since hospitals and HMOs have no institutional role or policy in abortion decision-making, and have not and do not advertise or promote abortion services, it can hardly be said that they "perform" abortions so as to conflict with a valid state purpose of disfavoring the same.

The lack of any institutional roles or policies of hospitals and HMOs sharply contrasts with the active institutional role of Planned Parenthood and similar organizations in providing elective abortions. Planned Parenthood undertook a study for three or four years prior to its board of directors' decision to expand corporate services to include the performing of abortions. Tr. at 20-21, 61-63. The board's decision was based in part upon a belief that existing providers were not adequately offering what the board perceived as sufficient numbers of abortions at a cost to meet the "need for abortions." Id. The corporate decision to "provide" abortions was publicly announced, and the agency opened new facilities, hired personnel, contracted with independent physicians to perform abortions and thereafter paid physicians for perform-

ing abortions on the Planned Parenthood clients referred to them. Id.

Persons seeking abortions usually make an appointment with Planned Parenthood as an agency. The person in need of services thus becomes a client of Planned Parenthood whose agents may counsel her. If the client in consultation with agents of Planned Parenthood decides to procure an abortion, Planned Parenthood's physician is sent by Planned Parenthood. The client pays Planned Parenthood and not the physician for the abortion service. Indeed, since the physician is under contract to Planned Parenthood rather than the client for performing the abortion, he or she is paid regardless of whether the abortion recipient pays Planned Parenthood. Tr. at 163-164. Planned Parenthood's abortion procural process involves the client going to Planned Parenthood, an agency which voluntarily has gained some notoriety as an abortion provider, referring the client to one of its agents to perform the abortion; thereafter it alone bills the client for its having provided the abortion service through one of its agents.

Institutionalized positions with respect to an issue may constitute a crucial difference in separating and distinguishing between organizations regardless of who actually implements the decision. A physician and his patient may ultimately determine whether or not to abort. However, to ignore the institutional milieu within which decisions are made, to disregard the vast distinction between organizations such as Planned Parenthood which publicly promotes abortions and hospitals and HMOs which do not is to disregard a critical determinate in awarding state funds.

CONCLUSION

The Minnesota Family Planning Grants Act was based upon several reasonable factors which could have been properly considered by the legislature. It was clearly erroneous for the lower courts to find that there was not a rational distinction between hospitals and HMOs where abortions are performed and private corporations which institutionally advocate and provide abortions. We respectfully request, therefore, that this Court note probable jurisdiction.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1218

PLANNED PARENTHOOD OF MINNESOTA,
a Minnesota non-profit corporation,
Appellee,

vs.

THE STATE OF MINNESOTA, RUDY PERPICH, individually and as Governor of the State of Minnesota, WARREN R. LAWSON, M.D., individually and as Commissioner of Health of the Minnesota Department of Health, WARREN SPANNAUS, individually and as Attorney General of the State of Minnesota, their agents, representatives, successors, those acting in concert with them, and all others similarly situated,
Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA.

Submitted: May 18, 1979
Filed: January 2, 1980

Before LAY, BRIGHT AND HENLEY, Circuit Judges.

LAY, Circuit Judge.

Planned Parenthood of Minnesota, a nonprofit corporation, sought a declaratory judgment under 28 U.S.C. § 2201, challenging the constitutionality of section 1, subdivision 2 of the Minnesota Family Planning Grants Act, Minn. Stat. Ann § 145.925 (2) (1979 Supp.). Under the Act $1,300,000 is appropriated for disbursement by the Minnesota Commission of Health to cities, counties, or nonprofit corporations to provide pre-pregnancy family planning services. The challenged subdivision provides:

> The commissioner shall not make special grants pursuant to this section to any nonprofit corporation which performs abortions. No state funds shall be used under contract from a grantee to any nonprofit corporation which performs abortions. This provision shall not apply to hospitals licensed pursuant to sections 144.50 to 144.56, or health maintenance organizations certified pursuant to chapter 62D.

The district court, the Honorable Donald Alsop presiding, concluded that granting funds for pre-pregnancy family planning to hospitals and health maintenance organizations (HMOs) who perform abortions, while denying funds to other nonprofit organizations involved in pre-pregnancy family planning who similarly perform abortions, denied equal protection of the law guaranteed under the Fourteenth Amendment to the United States Constitution. We affirm the judgment of the district court.

The district court rejected plaintiff's argument that the right of an individual to choose to have an abortion is at issue and that state legislation must be reviewed under the strict scrutiny test when such fundamental rights are involved. As long as a state has not denied individuals the right to choose

abortion services or to seek abortion services, no fundamental right is involved; nor is a state required to provide financial assistance for the exercise of that right. *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). The State's failure to fund pre-pregnancy family planning services sponsored by Planned Parenthood does not impinge on the personal right to privacy. Thus, we agree that the strict scrutiny test relied upon by Planned Parenthood, as applied in *Roe v. Wade*, 410 U.S. 113 (1973), was properly rejected by the district court.

Nonetheless, the district court found the statute unconstitutional. The court concluded there was no rational basis for the classification distinguishing between nonprofit organizations which are hospitals or HMOs and those which are not. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

In *Moreno* the constitutionality of section 3(e) of the Food Stamp Act was considered. The purpose of the Act was to alleviate hunger and malnutrition among the more needy segments of our society. Section 3(e) and the regulations promulgated thereunder limited participation in the food stamp program to households whose members were all related to each other. The Court held that the classification was "clearly irrelevant to the stated purposes of the Act." *Id.* It stated that if the classification was to be sustained it "must rationally further some legitimate governmental interest other than those specifically stated in the congressional 'declaration of policy.'" *Id.* The legislative history of section 3(e) indicated that the amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. The Court concluded:

> The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment." 345 F.Supp., at 314 n.11.

Id. at 534-35.

The record demonstrates that Planned Parenthood of Minnesota in its abortion stance has made itself unpopular among some segments of the population. The legislative history of Minn. Stat. Ann. § 145.925(2) indicates that Planned Parenthood's unpopularity played a large role in its passage. Planned Parenthood's unpopularity in and of itself and without reference to some independent considerations in the public interest cannot justify subdivision 2.

The district court observed in its unpublished opinion:

> There is a general agreement that *the purpose behind the Act itself is to expand the availability of pre-pregnancy family planning services in Minnesota.* . . .
>
> The legislative purpose behind the challenged provision is not as clear. It appears from the testimony at trial and the legislative record that the purpose of the exclusion is either (1) to insure that no state monies are used directly or indirectly to fund abortion services, or (2) to insure that no state monies are used to fund some non-profit corporations which perform abortion services. The issue presented to the court is whether the classifications

> drawn in the statute are reasonable in light of these purposes. *McLaughlin v. Florida*, 379 U.S. 184 (1964).
>
> . . . .
>
> There is no dispute that the funds appropriated under the Act must be distributed solely for pre-pregnancy family planning services; thus, there is no possibility that the funds could be utilized directly for abortion services.
>
> Defendants argue that the disbursement of Act funds to an organization which performs abortions as well as pre-pregnancy family planning services would allow such an organization to "free-up" monies of its own which it then could apply to the abortion services. This legislative concern is also found in the history of the Act. It is further evidenced by a purposed amendment to the Act which would have required an eligible applicant to maintain the same level of expenditure of its own monies on pre-pregnancy family planning services in a grant year as in the preceding year.
>
> Even if this were a legitimate legislative concern (and the court notes that the "freeing-up" argument has been rejected by the courts in the context of state funding of private education), there is no evidence that it supports the challenged exclusion. At trial, plaintiff introduced testimony that it routinely receives restricted funding which is carefully controlled and monitored. Plaintiff has received and utilized federal funds which are specifically prohibited from being used for abortions.
>
> . . . .
>
> The evidence adduced at trial is persuasive that there is no rational distinction between plaintiff and any other non-profit corporation with respect to the providing of pre-pregnancy family planning services, nor is there a

rational distinction between plaintiff and other non-profit corporations which perform abortions (such as hospitals and HMO's) with respect to the providing of pre-pregnancy family planning services. . . .

(emphasis added).

The district court further observed:

> Defendants allege that plaintiff has institutionalized its abortion policy in such a manner as to create an internal conflict of interest with the delivery of pre-pregnancy family planning services. The evidence at trial was that plaintiff initiated the performance of abortions at one clinic in January, 1977 as a result of its study indicating a high rate of repeat abortions in Minnesota. The decision was primarily motivated by a belief that through providing pre-pregnancy family planning counseling and contraceptive devices to women seeking abortions, plaintiff could help to reduce the re-occurrence of abortions.
>
> Plaintiff's mission is to provide counseling and information to its patients, to educate the public and other professionals, and to deliver medical care. (Pl. exh. 1) In its November 1973 General Procedural and Policy Statement on abortion (Pl. exh. 2), plaintiff states that it "does not consider abortion to be a primary means of birth planning." There is no evidence that the nature or quality of plaintiff's delivery of pre-pregnancy family planning services has been affected by its decision to perform abortions. With respect to eligibility for funds for pre-pregnancy family planning services, the fact that abortions are performed at one of plaintiff's clinics as a result of an institutional decision by its board of directors does not distinguish it from hospitals and HMO's

> which merely provide the facilities for private physicians to perform abortions.
>
> Defendants urge that hospitals and HMO's are distinguishable from other non-profit corporations which perform abortions in that (1) they perform abortions as part of the delivery of "total health care" services; (2) they are subject to greater legislative control and public accountability; (3) they provide superior in-house medical care resulting in better total family planning care; (4) they operate under a more complex accounting system which provides less opportunity for the operation of the freeing-up theory; and (5) HMO's are specifically required to provide abortions in certain circumstances. *There is no evidence to support the theory that these distinctions are critical or relevant to the granting of funds for pre-pregnancy family planning services.*

(emphasis added).

On appeal we are not persuaded that the reasoning of the district court, based on its detailed findings of fact, can be faulted. In this court, the State suggests three possible reasons to justify the classification. The first to encourage and expand family planning services, can be accomplished just as easily by Planned Parenthood—perhaps even more easily. Planned Parenthood is in the business of family planning; it has facilities or programs in nearly every county in Minnesota. Whereas much of the money going to HMOs and hospitals would be used for start-up costs, Planned Parenthood's programs are already in place and the additional money would go directly to the family planning services rather than staff, program outlines and facilities, and the extraneous costs of providing those services. The argument that the money given to Planned Parenthood by the state might free-up other money

which would be used for abortions was rejected by the district court. We further agree that Planned Parenthood's accounting procedures are more than adequate to insure that state money is not used for abortions nor allowed to free-up other money for abortions.

The second justification, that hospitals and HMOs implement abortion decisions already made by others, is making a distinction without a difference. Planned Parenthood's General Procedural and Policy Statements on abortion state: "[T]he decision whether or not to have an abortion is one which rightly should be left to the individual woman and her physician." There is no difference between hospitals, HMOs and Planned Parenthood in regard to the role they play in the abortion decision. In every instance it is up to the woman and her doctor.

The third justification, that hospitals and HMOs provide total health care, is misleading and insignificant. Many HMOs, according to the record, must use the additional facilities that a hospital offers. But even if both organizations did offer complete health care, to distinguish them from Planned Parenthood on that basis is irrelevant to the purpose of the Act, which as the district court found, is to expand the availability of pre-pregnancy family planning services. Not only must " 'a classification . . . "be reasonable, . . . [it] must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v Virginia*, 253 U.S. 412, 415 (1920).' " *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)). Providing complete health care has no fair and substantial relation to expanding pre-pregnancy family planning services. The argument, at least in part, implies that patient

safety was a concern of the legislature. It was established, however, that the risks of pre-pregnancy family planning services are slight and when complications do occur, it is invariably long after the patient has left the site where the services were rendered. In any event, if patient safety was indeed a serious concern of the legislature, it seems peculiar that it did not exclude all nonprofit corporations other than hospitals and HMOs from funding, rather than just those that performed abortions.[1]

The justifications offered by the State are not unlike the rationale offered by the Government in *Moreno*. There the Court stated:

> [T]he Government maintains that the challenged classification should nevertheless be upheld as rationally related to the clearly legitimate governmental interest in minizing fraud in the administration of the food stamp program. In essence, the Government contends that, in adopting the 1971 amendment, Congress might rationally have thought (1) that households with one or more unrelated members are more likely than "fully related" households to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor; and (2) that such households are "relatively unstable," thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households, we still could not agree with

[1] While we conclude that the district court properly held that the exclusion of appellee from participation in the state funds was improper, we wish to make it clear that we do not now deal with the right of the State of Minnesota to regulate by statute or otherwise the surgical, medical, hygienic or other standards that must be followed in the actual performance of abortions.

the Government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

Moreno, 413 U.S. at 535-36 (footnote omitted).

Judgment affirmed.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-78 Civ. 296

PLANNED PARENTHOOD OF MINNESOTA,
a Minnesota non-profit corporation,

Plaintiff,

vs.

THE STATE OF MINNESOTA, RUDY PERPICH, individually and as Governor of the State of Minnesota, WARREN R. LAWSON, M.D., individually and as Commissioner of Health of the Minnesota Department of Health, WARREN SPANNAUS, individually and as Attorney General of the State of Minnesota, their agents, representatives, successors, those acting in concert with them, and all others similarly situated,

Defendants.

MEMORANDUM ORDER

FRANZ P. JEVNE, III, Esq. and GREGORY PULLES, Esq., Mackall, Crounse & Moore, Minneapolis, Minnesota, appeared for the plaintiff.

KENT G. HARBISON, Esq., Special Assistant Attorney General, and TERRY O'BRIEN, Esq., Special Assistant Attorney General, St. Paul, Minnesota, appeared for the defendants.

The above-entitled action came on for trial before the court on January 15 through 17, 1979. Plaintiff, Planned Parenthood, is challenging the constitutionality of Section 1, Subdivision 2 of the Minnesota Family Planning Grants Act, Minn. Laws 1978, Ch. 775 (the "Act"). This memorandum opinion shall constitute the court's findings of fact and conclusions of law pursuant to Rule 52 of the Fed. R. Civ. P.

The Act establishes an appropriation of $1.3 million to the Minnesota Commissioner of Health for disbursement to cities, counties or non-profit corporations to provide pre-pregnancy family planning services. Section 1, subdivision 2 provides as follows:

> The commissioner shall not make special grants pursuant to this section to any nonprofit corporation which performs abortions. No state funds shall be used under contract from a grantee to any nonprofit corporation which performs abortions. This provision shall not apply to hospitals licensed pursuant to sections 144.50 to 144.56, or health maintenance organizations certified pursuant to chapter 62D.

Plaintiff seeks to have the challenged provision declared unconstitutional and to have defendants permanently enjoined from enforcing its mandate. This court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

Plaintiff is a private, non-profit corporation which provides pre-pregnancy family planning services through ten clinics and a network of family planning workers covering 77 of Minnesota's 87 counties. In many counties, plaintiff is the only organized provider of family planning services. Plaintiff additionally provides first trimester abortions at its Ford Parkway Clinic in St. Paul, Minnesota.

Defendants are the State of Minnesota and the officials responsible for the implementation and enforcement of the Act.

Plaintiff presents three constitutional issues to the court. The first is whether plaintiff's right to privacy as guaranteed by the Ninth and Fourteenth Amendments is unconstitutionally impinged upon by its exclusion from eligibility for funds under the act.

The second issue raises the question of whether plaintiff's Fourteenth Amendment right of equal protection is violated by the exclusion of plaintiff from eligibility to receive funds under the Act solely because plaintiff provides abortion services, particularly when hospitals and health maintenance organizations (HMO's), which also provide abortion services, remain eligible.

The third issue raised is whether plaintiff's exclusion from eligibility constitutes a bill of attainder prohibited by Article I, § 10 of the United States Constitution.

At trial, plaintiff sought to introduce into evidence plaintiff's exhibits 5-37, inclusive, consisting of minutes, journal excerpts, and tapes, logs, and transcripts of the legislative history of the Act as well as the various engrossments of the bill. Defendants objected on the grounds of relevancy, and the court reserved ruling on the issue.

The court has determined that the legislative materials offered by plaintiff are relevant and admissible evidence on the issues of equal protection and bill of attainder. For these purposes, they will be received and considered. With respect to the equal protection issue, the legislative history is relevant to a determination of the statutory purpose and to a determination of the rational relationship of the challenged discrimination to that purpose. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Shapiro v. Thompson*, 394 U.S/ 618 (1969); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

With respect to the bill of attainder issue, the legislative history is relevant to a determination of legislative intent to punish. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *United States v. O'Brien*, 391 U.S. 367, 384 Fn. 30 (1968); *Flemming v. Nestor*, 363 U.S. 603 (1960); *United States v. Lovett*, 328 U.S. 303 (1946).

Invasion Of Privacy

Plaintiff contends that the Act intends to, and has the effect of, coercing plaintiff to discontinue providing abortion services in order to be eligible for pre-pregnancy family planning services funding under the Act. Plaintiff alleges that this coercion deprives plaintiff, its physicians, and its patients of their respective rights to provide and to seek first trimester abortions in the exercise of the constitutional right to privacy. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

Defendants argue first that plaintiff lacks standing to assert the right to privacy in this instance. Assuming standing, they claim that the deprivation of eligibility for financial subsidy is not the sort of interest protected by the right of

privacy. *Maher v. Roe*, 432 U.S. 464 (1977). The Act does not affirmatively prohibit abortions or subject physicians who perform abortions to criminal sanctions.

The court will assume that plaintiff has standing to assert the privacy claim. Even so, the court finds that the Act does not impose an undue burden on the rights of plaintiff, its physicians, or its patients to provide or to seek abortion services. As long as those persons have not been precluded by governmental action from choosing to provide abortion services or to seek such services, they have not been deprived of a fundamental right. *Doe v. Mundy*, 411 F. Supp. 447 (E.D. Wisc. 1977). The state is not required to provide financial assistance for the exercise of that right. *Maher v. Roe, supra.*

The court further finds that plaintiff has not been the direct recipient of state funds for either its family planning services or its abortion services in the past; thus, it is not being deprived of anything which it has heretofore had available. furthermore, no evidence was presented at trial that the denial of funds under the Act will cause plaintiff to discontinue its abortion services in order to become eligible for funding.

Equal Protection

The next issue presented is whether a state statute which excludes from eligibility for funding for pre-pregnancy family planning services any non-profit corporation which performs abortions, while exempting hospitals or HMO's which perform abortions, violates the Fourteenth Amendment right to equal protection under the laws.

The court must first determine the appropriate legal standard to be applied to the facts presented. Plaintiff contends alternatively that (1) an invasion of the fundamental right to privacy is involved and (2) the discrimination is invidious and arbitrary on its face; consequently, plaintiff urges the

court to utilize the strict scrutiny analysis, which requires a compelling state interest to justify the exclusion and exemption.

As discussed in the preceding section, the court has concluded that plaintiff's fundamental right to privacy is not involved in this proceeding. In view of the court's conclusions below upon the application of the rational basis test, it need not decide whether the strict scrutiny test is triggered by the allegedly invidiously discriminatory nature of the statute.

Where the strict scrutiny test is not applicable, the appropriate analysis for the court is the rational basis approach. This involves a two-step analysis. First, there must be a legitimate state purpose for the legislation, and second, the legislation must be rationally related to that purpose.

There is general agreement that the purpose behind the Act itself is to expand the availability of pre-pregnancy family planning services in Minnesota. There is ample evidence of this in the legislative record. This is unquestionably a legitimate statutory purpose. Whether the Act implements this purpose in the most efficient or expeditious manner is not a proper subject of review by this court.

The legislative purpose behind the challenged provision is not as clear. It appears from the testimony at trial and the legislative record that the purpose of the exclusion is either (1) to insure that no state monies are used directly or indirectly to fund abortion services, or (2) to insure that no state monies are used to fund some non-profit corporations which perform abortion services. The issue presented to the court is whether the classifications drawn in the statute are reasonable in light of these purposes. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

With respect to insuring that no state monies are used to fund abortion services, the United States Supreme Court held in *Maher v. Roe*, 432 U.S. 464 (1977), that the state has a strong and legitimate interest in encouraging natural childbirth; thus, the state's intention to avoid funding abortions is a valid one. However, on the basis of the evidence adduced at trial, the challenged exclusion bears no rational relationship to this purpose.

There is no dispute that the funds appropriated under the Act must be distributed solely for pre-pregnancy family planning services; thus, there is no possibility that the funds could be utilized directly for abortion services.

Defendants argue that the disbursement of Act funds to an organization which performs abortions as well as pre-pregnancy family planning services would allow such an organization to "free-up" monies of its own which it then could apply to the abortion services. This legislative concern is also found in the history of the Act. It is further evidenced by a proposed amendment to the Act which would have required an eligible applicant to maintain the same level of expenditure of its own monies on pre-pregnancy family planning services in a grant year as in the preceding year.

Even if this were a legitimate legislative concern (and the court notes that the "freeing-up" argument has been rejected by the courts in the context of state funding of private education), there is no evidence that it supports the challenged exclusion. At trial, plaintiff introduced testimony that it routinely receives restricted funding which is carefully controlled and monitored. Plaintiff has received and utilized federal funds which are specifically prohibited from being used for abortions.

Defendants have introduced no factual evidence to support their freeing-up theory. Plaintiff's application for Act funds, which is on file with the commissioner, anticipates an expansion of plaintiff's pre-pregnancy family planning services. It does not create the potential for the reallocation of funds within the corporation.

The court concludes that the exclusion of non-profit corporations which perform abortions from eligibility for funds under the Act bears no reasonable relationship to the legislative purpose of not funding abortions.

With respect to insuring that no state monies are used to fund some non-profit corporations which perform abortions, the court will assume that it is arguably constitutionally permissible for a state to adopt and maintain a policy of providing no funding to any agency or entity which performs abortions. In the instant case, however, the statute allows some such corporations (hospitals and HMO's) to remain eligible for funds under the Act while excluding all other such organizations. The court must thus determine whether there is some rational basis for this distinction.

The evidence adduced at trial is persuasive that there is no rational distinction between plaintiff and any other non-profit corporation with respect to the providing of pre-pregnancy family planning services, nor is there a rational distinction between plaintiff and other non-profit corporations which perform abortions (such as hospitals and HMO's) with respect to the providing of pre-pregnancy family planning services. The expert testimony was that there is no inherent difference in the quality or nature of the rendition of pre-pregnancy family planning services by plaintiff, an HMO, or a hospital.

Defendants allege that plaintiff has institutionalized its abortion policy in such a manner as to create an internal con-

flict of interest with the delivery of pre-pregnancy family planning services. The evidence at trial was that plaintiff initiated the performance of abortions at one clinic in January, 1977 as a result of its study indicating a high rate of repeat abortions in Minnesota. The decision was primarily motivated by a belief that through providing pre-pregnancy family planning counseling and contraceptive devices to women seeking abortions, plaintiff could help to reduce the re-occurrence of abortions.

Plaintiff's mission is to provide counseling and information to its patients, to educate the public and other professionals, and to deliver medical care. (Pl. exh. 1) In its November 1973 General Procedural and Policy Statement on abortion (Pl. exh. 2), plaintiff states that it "does not consider abortion to be a primary means of birth planning." There is no evidence that the nature or quality of plaintiff's delivery of pre-pregnancy family planning services has been affected by its decision to perform abortions. With respect to eligibility for funds for pre-pregnancy family planning services, the fact that abortions are performed at one of plaintiff's clinics as a result of an institutional decision by its board of directors does not distinguish it from hospitals and HMO's which merely provide the facilities for private physcians to perform abortions.

Defendants urge that hospitals and HMO's are distinguishable from other non-profit corporations which perform abortions in that (1) they perform abortions as part of the delivery of "total health care" services; (2) they are subject to greater legislative control and public accountability; (3) they provide superior in-house medical care resulting in better total family planning care; (4) they operate under a more complex accounting system which provides less opportunity for the operation of the freeing-up theory; and (5) HMO's are specifically required to provide abortions in certain circumstances. There is no evidence to support the theory that these distinctions are critical or relevant to the granting of funds for pre-pregnancy family planning services.

The court thus concludes that there is no rational basis to support the exclusion of non-profit corporations which perform abortions, with the exemption of hospitals and HMO's, from eligibility for funding under the Act. This being the case, the challenged provision unconstitutionally violates plaintiff's rights to equal protection under the law.

BILL OF ATTAINDER

Plaintiff contends that the exclusion of Planned Parenthood from eligibility for funding under the Act constitutes a bill of attainder prohibited by Article 1, Section 10 of the United States Constitution.

To constitute a bill of attainder, the challenged legislation must contain the elements of specificity of identification, punishment, and lack of a judicial trial. *United States v. O'Brien*, 391 U.S. 367, 383, n. 30 (1968). The United States Supreme Court in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) recently identified three tests to determine whether legislation survives a bill of attainder challenge: the historical test which is inapplicable here, the functional test which looks at whether the law furthers any nonpunitive legislative purpose, and the motivational test which assesses the legislative record for a legislative intent to punish.

Common to all analyses is a resolution of the critical issue of legislative intent to punish and/or effect of punishment. The legislative history surrounding the passage of the Act in general and the challenged provision in particular bears no evidence of a punitive intent directed towards plaintiff. Planned Parenthood was referred to by name on several occasions, both

specifically and in a generic sense, and may have been the primary target of the exclusion for some legislators. However, the overriding objective was the desire not to fund abortions, or agencies which perform abortions, rather than a desire to punish Planned Parenthood for performing abortions or for offering abortion services. The court thus concludes that the challenged provision does not constitute punishment of Planned Parenthood.

Since neither the intent nor the effect of the legislation is to punish Planned Parenthood, the challenged provision is not constitutionally infirm as a bill of attainder.

Severability

Minn. Stat. § 645.20 provides:

> Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Pursuant to this provision, the court finds that Section 1, Subdivision 2 is severable from the balance of the Act. This was the position taken by all the parties.

Conclusion

The court having found that Section 1, Subdivision 2 of the Act is an unconstitutional denial of plaintiff's Fourteenth

Amendment rights to equal protection, it will order that provision be declared unconstitutional and will enjoin defendants from enforcing it.

Upon the foregoing,

IT IS ORDERED That the preliminary injunction issued by this court on November 24, 1978, as modified December 13, 1978, be and hereby is dissolved and of no further force and effect.

IT IS FURTHER ORDERED That the clerk shall enter judgment as follows:

> Section 1, Subdivision 2 of Minn. Laws 1978, Ch. 775 is unconstitutional and defendants are enjoined from enforcing the same.

Dated: February 23, 1979.

DONALD D. ALSOP
United States District Judge

APPENDIX C

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1218 September Term, 1979

PLANNED PARENTHOOD OF MINNESOTA,
a Minnesota non-profit corporation,

Appellee,

vs.

THE STATE OF MINNESOTA, RUDY PERPICH, individually and as Governor of the State of Minnesota, WARREN R. LAWSON, M.D., individually and as Commissioner of Health, of the Minnesota Department of Health, WARREN SPANNAUS, individually and as Attorney General of the State of Minnesota, their agents, representatives, successors, those acting in concert with them, and all others similarly situated,

Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

THIS CAUSE came on to be heard on the designated record of the United States District Court for the District of Minnesota and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said Dis-

trict Court, in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

Costs taxed in favor of Appellees: January 2, 1980

Costs of brief:	$33.58
Total costs of Appellees for recovery from Appellants in the U. S. District Court:	$33.58

APPENDIX D

Minnesota Statutes, ch. 145 (1978)

145.925 FAMILY PLANNING GRANTS. Subdivision 1. The commissioner of health may make special grants to cities, counties, groups of cities or counties, or nonprofit corporations to provide pre-pregnancy family planning services.

Subd. 2. The commissioner shall not make special grants pursuant to this section to any nonprofit corporation which performs abortions. No state funds shall be used under contract from a grantee to any nonprofit corporation which performs abortions. This provision shall not apply to hospitals licensed pursuant to sections 144.50 to 144.56, or health maintenance organizations certified pursuant to chapter 62D.

Subd. 3. No funds provided by grants made pursuant to this section shall be used to support any family planning services for any unemancipated minor in any elementary or secondary school building.

Subd. 4. Except as provided in sections 144.341 and 144.342, any person employed to provide family planning services who is paid in whole or in part from funds provided under this section who advises an abortion or sterilization to any un-

emancipated minor shall, following such a recommendation, so notify the parent or guardian of the reasons for such an action.

Subd. 5. The commissioner of health shall promulgate rules for approval of plans and budgets of prospective grant recipients, for the submission of annual financial and statistical reports, and the maintenance of statements of source and application of funds by grant recipients. The commissioner of health may not require that any home rule charter or statutory city or county apply for or receive grants under this subdivision as a condition for the receipt of any state or federal funds unrelated to family planning services.

Subd. 6. The request of any person for family planning services or his or her refusal to accept any service shall in no way affect the right of the person to receive public assistance, public health services, or any other public service. Nothing in this section shall abridge the right of the individual to make decisions concerning family planning, nor shall any individual be required to state his or her reason for refusing any offer of family planning services.

Any employee of the agencies engaged in the administration of the provisions of this section may refuse to accept the duty of offering family planning services to the extent that the duty is contrary to his personal beliefs. A refusal shall not be grounds for dismissal, suspension, demotion, or any other discrimination in employment. The directors or supervisors of the agencies shall reassign the duties of employees in order to carry out the provisions of this section.

All information gathered by any agency, entity, or individual conducting programs in family planning is private data on individuals within the meaning of section 15.162, subdivision 5a.

Subd. 7. A grant recipient shall inform any person requesting counselling on family planning methods or procedures of:

(1) Any methods or procedures which may be followed, including identification of any which are experimental or any which may pose a health hazard to the person;

(2) A description of any attendant discomforts or risks which might reasonably be expected;

(3) A fair explanation of the likely results, should a method fail;

(4) A description of any benefits which might reasonably be expected of any method;

(5) A disclosure of appropriate alternative methods or procedures;

(6) An offer to answer any inquiries concerning methods of procedures; and

(7) An instruction that the person is free either to decline commencement of any method or procedure or to withdraw consent to a method or procedure at any reasonable time.

Subd. 8. Any person who receives compensation for services under any program receiving financial assistance under this section, who coerces or endeavors to coerce any person to undergo an abortion or sterilization procedure by threatening the person with the loss of or disqualification for the receipt of any benefit or service under a program receiving state or federal financial assistance shall be guilty of a misdemeanor.

[*1978 c 775 s 1*]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1218

PLANNED PARENTHOOD OF MINNESOTA,
a Minnesota Corporation,

Appellee,

vs.

THE STATE OF MINNESOTA, et al.,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Minnesota and the other above-named appellants hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Eighth Circuit filed and entered on January 2, 1980, affirming the judgment of the United States District Court for the District of Minnesota dated February 23, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: January 7, 1980.

STATE OF MINNESOTA
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Supreme Court, U. S.
FILED
APR 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1436

THE STATE OF MINNESOTA, RUDY PERPICH, individually and as Governor of the State of Minnesota, WARREN R. LAWSON, M.D., individually and as Commissioner of Health of the Minnesota Department of Health, WARREN SPANNAUS, individually and as Attorney General of the State of Minnesota, their agents, representatives, successors, those acting in concert with them, and all others similarly situated,

Appellants,

vs.

PLANNED PARENTHOOD OF MINNESOTA, a Minnesota non-profit corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM THE JUDGMENT

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TABLE OF CONTENTS

	Page
Motion to Affirm the Judgment	1
Opinions Below	2
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Eisenstadt v. Baird, 405 U.S. 438 (1972)	6
Morey v. Doud, 354 U.S. 457 (1957)	6
Shapiro v. Thompson, 394 U.S. 618 (1969)	6
Smith v. Cahoon, 283 U.S. 553 (1931)	6
United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)	6

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PLANNED PARENTHOOD OF MINNESOTA, a Minnesota non-profit corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM THE JUDGMENT

Pursuant to Rules 16 and 35 of the Revised Rules of this Court, Appellee respectfully moves that the judgment of the United States Court of Appeals for the Eighth Circuit be affirmed.

OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota is unpublished. The opinion of the United States Court of Appeals for the Eighth Circut is reported at 612 F.2d 359 (8th Cir., 1980).

QUESTION PRESENTED

Does the Family Planning Grants Act, Minnesota Session Laws, 1978, Chapter 775, Section 1, Subdivision 2 (Minnesota Statutes Section 145.925, Subd. 2), deny to Planned Parenthood of Minnesota equal protection of the law in violation of the Fourteenth Amendment to the Constitution?

STATEMENT

This is an appeal from the judgment of the United States Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court for the District of Minnesota which held that Subdivision 2 of Minnesota Statutes Section 145.925 is unconstitutional in that it creates an irrational and discriminatory classification which denies to Appellee Planned Parenthood of Minnesota the equal protection of the law in violation of the Fourteenth Amendment to the Constitution.

This action was commenced in United States District Court by Appellee following the enactment of the challenged legislation in 1978. The Family Planning Grants Act (hereinafter "the Act") appropriated $1,300,000 to provide "pre-pregnancy family planning services." The money was to be expended by the making of

special grants to "cities, counties, groups of cities or counties, or nonprofit corporations." Subdivision 2 of the Act provided that no grants or contracts from a grantee could be awarded "to any nonprofit corporation which performs abortions," except hospitals or health maintenance organizations (hereinafter "HMO's). The District Court issued a preliminary injunction enjoining the enforcement of Subdivision 2 of the Act. A trial on the merits was held January 15-17, 1979, and the trial court issued its Memorandum Order granting a permanent injunction on February 23, 1979. The Defendants appealed that Order to the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court decision on January 2, 1980.

There were virtually no controverted facts at the trial. Appellee is one of only two nonprofit corporations that were excluded from funding under Subdivision 2 of the Act. Appellee is by far the largest organized provider of pre-pregnancy family planning services in Minnesota, providing approximately 50% of all such services in the state through its ten clinic locations and a network of family planning workers. Appellee also provides first trimester abortion services at one clinic in St. Paul. Appellee had applied for grant funds under the Act that would pay for pre-pregnancey family planning services that were in addition to, and in no way duplicative of, any of its existing services. Appellee maintains a specialized and detailed accounting system which is utilized to segregate and account for funds which are available only for restricted purposes. Appellee currently administers and accounts for expenditures of restricted private and public funds which cannot be used for abortion services. Appellee's pre-pregnancy

family planning services were shown to be of high quality and in compliance with all federal and state requirements.

The expert evidence established that there was absolutely no inherent difference in the quality or nature of pre-pregnancy family planning services provided by a non-profit corporation which provides abortions as compared to one which does not. The expert evidence further established that there was absolutely no inherent difference in the quality or the nature of pre-pregnancy family planning services provided by hospitals and HMO's as compared to any other nonprofit corporations which provided abortion services. The trial court specifically found that there was no evidence that Appellee's pre-pregnancy family planning services were in any way affected by its decision also to provide abortion services.

The trial court also specifically found that there was no factual evidence to support the argument that funds provided to Appellee under the Act would "free-up" other funds of Appellee and thus indirectly provide funding for abortion services. Not only does Appellee have an accounting system that prevents any mis-application of such funds, but Appellee was also committed to utilization of any funds for new, expanded and additional pre-pregnancy family planning programs, prohibiting the reallocation of funds within the corporation to be used for abortion services.

The trial court was unable to find in the legislative history of the Act any indication of a rational basis for the classification created by Subdivision 2.

The Eighth Circuit Court of Appeals adopted the facts adduced by the District Court, and recited them at length in its opinion, while focusing primarily on the rationality

of any classification distinguishing Appellee from hospitals and HMO's.

ARGUMENT

The classification created by Subdivision 2 of the Act is on its face irrationally discriminatory, even without resort to the facts assembled in support of that conclusion at trial.

First, the Act provides funding only for "pre-pregnancy family planning services" thus, by its own terms, making irrelevant and irrational any reference to post-pregnancy services such as abortion in determining eligibility for the funds.

Second, if one ever could sustain the argument that the performing of post-pregnancy procedures is somehow a factor in one's ability to provide "pre-pregnancy family planning services," then it follows that the distinction between hospitals and HMO's and other abortion providers is irrational. It is particularly irrational if the argument being used to support the distinction between abortion providers and non-providers is that any funding given to abortion providers will of necessity free up monies which could be expended for abortion services.

Finally, if the distinction between nonprofit corporations such as Appellee on the one hand and hospitals and HMO's on the other is shown to be rational and valid, presumably based upon the argument that there is some qualitative or quantitive difference in the ability to deliver services, then the inclusion of nonprofit corporations other than Appellee that are not hospitals and HMO's becomes per se illogical.

The challenged legislation is even more patently and unarguably unconstitutional in light of the facts adduced by the trial court and included in the opinions of both the District Court and the Eighth Circuit Court of Appeals. These findings establish incontrovertibly that there are no facts of any kind that might serve as an arguable basis for the classification created by the Act. The courts below have specifically found that there is no difference between nonprofit corporations that do provide abortions and those that do not in providing pre-pregnancy family planning services. The courts below have specifically found that there is no difference between nonprofit corporations and hospitals and HMO's in the provision of pre-pregnancy family planning services. In fact, as the Court of Appeals opinion pointed out, the challenged exclusionary classification actually operated directly contrary to the legitimate purpose of the Act, the encouragement and expansion of pre-pregnancy family planning services. The exclusionary language has the effect of excluding Appellee, which already has in place an extensive network of staff and facilities with which to effectuate the intent of the legislation so as to reach the greatest number of recipients at the least cost.

The clear unconstitutionality of the challenged portion of the Act is supported by a number of decisions dealing with analogous statutory provisions. The Court of Appeals for the Eighth Circuit relied primarily upon *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). Also instructive are *Smith v. Cahoon*, 283 U.S. 553 (1931); *Morey v. Doud*, 354 U.S. 457 (1957); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Shapiro v. Thompson*, 394 U.S. 618 (1969).

In order to argue that the prior decisions of the District Court and the Court of Appeals for the Eight Circuit are in error, Appellants are placed in the position of arguing that the findings of fact of the two lower courts are clearly erroneous. Yet, as is obvious from the contents of Appellants' Jurisdictional Statement, they can cite no contrary evidence in the record which might tend to impeach the findings of the lower courts. The facts proved by Appellee at trial were unrebutted, and reinforced by testimony from Appellants' own witnesses.

The case viewed as a whole is not one which presents this Court with substantial and difficult questions. Indeed, there is only one question which can be easily resolved in summary fashion after examination of the lower court opinions and the statutory language under challenge. It is a case where the final result to be reached is clearly indicated. It is submitted that the issues herein are therefore unsubstantial, and the lower judgments should be affirmed without noting probable jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Motion to Affirm the Judgment should be granted and the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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